IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-819

UNITED STATES OF AMERICA, PETITIONER

-vs-

CLARENCE JAY CROZIER AND
FLORENCE MARGARET WOLKE, ET AL.

OPPOSITION ON BEHALF OF RESPONDENT FLORENCE MARGARET WOLKE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TOM O'TOOLE
Federal Public Defender
District of Arizona

SANDRA LYNN SLATON
Asst. Federal Public Defender
U.S. District Court House
230 North First Avenue
Room 5202, Federal Bldg.
Phoenix, AZ 85025
Telephone: FTS 261-3561
Attorneys for Respondent Wolke

COUNTER STATEMENT OF QUESTIONS PRESENTED

I

WHETHER THE LOWER COURT CORRECTLY DETERMINED THAT THE GOVERNMENT VIOLATED FLORENCE MARGARET WOLKE'S FIFTH AMENDMENT RIGHT TO DUE PROCESS WHEN IT OBTAINED A PRETRIAL EX PARTE RESTRAINING ORDER AGAINST HER UNDER TITLE 21 UNITED STATES CODE §848, THEREBY SEIZING ALL OF HER PROPERTY PRIOR TO TRIAL ON THE BASIS OF AN INDICTMENT ALONE, WITHOUT EVER AFFORDING HER AN EVIDENTIARY HEARING AND EVEN THOUGH SHE WAS NOT CHARGED WITH A VIOLATION OF SUCH STATUTE.

II

WHETHER THE LOWER COURT'S SUPPRESSION OF EVIDENCE WAS PROPER WHEN IT DETERMINED THAT POLICE ILLEGALLY ENTERED AND SEARCHED FLORENCE MARGARET WOLKE'S HOME IN THE ABSENCE OF EXIGENT CIRCUMSTANCES, AND CONTINUED TO ILLEGALLY SIEZE IT FOR SIX HOURS PRIOR TO THE ARRIVAL OF A SEARCH WARRANT.

III

WHETHER THE LOWER COURT PROPERLY SUPPRESSED EVIDENCE AFTER IT DETERMINED THAT THE GOVERNMENT'S SEARCH AND SEIZURE OF VIRTUALLY ALL OF FLORENCE MARGARET WOLKE'S PERSONAL PAPERS WAS UNREASONABLE PURSUANT TO A BROAD SWEEPING WARRANT AUTHORIZING THE SEIZURE OF "NOTES" AND "INDICIA OF OWNERSHIP" WHICH FAILED TO DELINEATE ANY GUIDELINES OF PARTICULARITY WHATSOEVER.

PARTIES TO THE PROCEEDING

In addition to the named parties, Manuel Isadore Pine and Alan Terry Stein were defendants in the district court and are respondents here.

TABLE OF CONTENTS

	PAGES
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement	2
Reasons for Denying the Petition	
I	9
II	17
III	24
Conclusion	27
Affidavit of Service	28
Appendix A	29
Appendix B	31
Appendix C	36
Appendix D	39
Appendix E	40
Appendix F	41
Appendix G	45
Appendix H	46
Appendix I	47

TABLE OF AUTHORITIES

PAGES

CASES:

Andresen v. Maryland,
427 U.S. 463 (1976) 25, 26

Bell v. Burson,
402 U.S. 535 (1971) 11

Bell v. Wolfish,
441 U.S. 520 (1979) 13

C.I.R. v. Shapiro,
424 U.S. 614 (1976) 16

Coolidge v. New Hampshire,
403 U.S. 443 (1971) 26

Fuentes s. Shevin,
407 U.S. 67, (1972) 11, 14, 16

Goldberg v. Kelly,
397 U.S. 254 (1970) 11, 16

Johnson v. United States,
333 U.S. 10 (1948). 19

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963) 13

Marron v. United States,
275 U.S. 192 (1927) 26

North Georgia Finishing, Inc. v. Di-Chem, Inc.,
419 U.S. 601 (1975) 16

Payton v. New York,
445 U.S. 573 (1980) 21

Sniadach v. Family Finance Corp.,
395 U.S. 337 (1969) 16

Stanford v. Texas,
379 U.S. 476 (1965) 26

Stanley v. Illinois,
405 U.S. 645 (1972) 10, 11

United States v. Allard,
634 F.2d 1182 (9th Cir. 1980) . . . . . Passim

United States v. Beck,
662 F.2d 527 (8th Cir. 1981). 21

United States v. Bosby,
675 F.2d 1174 (11th Cir. 1982). 21

United States v. Cardwell,
680 F.2d 75 (9th Cir. 1982) 26

United States v. Chadwick,
433 U.S. 1 (1977) 19

United States v. Cortellesso,
601 F.2d 28 (1st Cir. 1979) 25

CASES CONTD: PAGES

United States v. Crozier,
674 F.2d 1293 (9th Cir. 1982) . . . . . Passim

United States v. Fitzharris,
633 F.2d 416 (5th Cir. 1980). 21

United States v. Griffin,
502 F.2d 959 (6th Cir. 1974), cert. denied
419 U.S. 1050 (1974). 22

United States v. Kinney,
638 F.2d 941 (6th Cir. 1981). 21

United States v. Long,
654 F.2d 911 (3rd 1981) . . . . . Passim

United States v. Segura,
663 F.2d 411 (2nd Cir. 1981). 22, 23

United States v. Smith,
686 F.2d 234 (5th Cir. 1982). 25

United States v. Spilotro,
680 F.2d 612 (9th Cir. 1982). 15

United States v. Torgersen,
695 F.2d 682 (8th Cir. 1982). 21

United States v. Veon,
538 F. Supp. 237 (E.D. Cal. 1982) 15

United States v. Weeks,
232 U.S. 383 (1914) 19, 20

Wong Sun v. United States,
371 U.S. 471 (1963) 16, 22

STATUTES:

Title 18 United States Code §1952 2

Title 18 United States Code §1961 13

Title 18 United States Code §3006(d)(b) . . . . . .

Title 18 United States Code §3146 12

Title 21 United States Code §841. 8

Title 21 United States Code §841(a)(1). 2

Title 21 United States Code §846. . . . . 2, 8

Title 21 United States Code §848. . . . . Passim

Title 21 United States Code §848(d) 9, 12, 13

Title 21 United States Code §848(d)(2). 14, 15

Title 21 United States Code §881. . . . . 3, 11

PAGES

RULES:

Federal Rules of Civil Procedure, Rule 65 . . . . . 9, 13, 14

Federal Rules of Criminal Procedure, Rule 7(c)(2). 14

Federal Rules of Criminal Procedure, Rule 16 10

Federal Rules of Criminal Procedure, Rule 32(b)(2) 14

Federal Rules of Criminal Procedure, Rule 54(b)(5) 14

Federal Rules of Evidence, Rule 802. 15

Federal Rules of Evidence, Rule 1101(b). 15

Federal Rules of Evidence, Rule 1101(d)(3) 15

Federal Rules of Evidence, Rule 1101(d) or (e) 15

AMENDMENTS:

Fourth Amendment, United States Constitution. . . . . Passim

Fifth Amendment, United States Constitution. . . . . Passim

OTHER CONSTITUTIONS:

Magna Carta 12

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CLARENCE JAY CROZIER AND
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OPPOSITION TO THE PETITION FOR
A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Respondent, FLORENCE MARGARET WOLKE, by and through counsel undersigned, hereby enters her opposition to the government's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is United States v. Crozier, 674 F.2d 1293 (9th Cir. 1982). It is also Appendix A of the government's petition.

JURISDICTION

The respondent adopts the jurisdictional statement of the government's petition (Petition 1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The respondent adopts the Statutory Provision cited by the government in its petition (Petition 2). In addition, the Fourth and Fifth Amendments to the United States Constitution are involved:

AMENDMENT IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasis added)

STATEMENT

This case centers around an alleged complex drug conspiracy to manufacture and distribute methamphetamine. On January 14, 1981, Florence Margaret Wolke was indicted, along with Clarence J. Crozier and nine codefendants, for conspiracy to manufacture and possess methamphetamine together with the substantive counts thereof, in violation of Title 21 United States Code §846, §841(a)(1), and Title 18 United States Code §1952. The same indictment charges Mr. Crozier, but not Ms. Wolke, with engaging in a continuing criminal enterprise in violation of Title 21 United States Code §848.

I. Restraining Orders.

A. Procedural Background:

In April, 1980 the government filed criminal charges against Clarence J. Crozier and others. 1/ On June 25, 1980, the government obtained an order dismissing those charges.

1/ This case arose out of same facts as the present criminal case and was numbered: CR-82-082-Phx-WEC. However, Ms. Wolke was not a defendant in that case.

On the following day, June 26, 1980, it brought a civil forfeiture action against Crozier pursuant to Title 21 United States Code §881.[2/] Though Ms. Wolke was not a party to any proceeding, virtually all of both Mr. Crozier's and Ms. Wolke's personal and real property was seized. On January 14, 1981, while the civil action was pending, Ms. Wolke and Mr. Crozier were indicted. On March 23, 1981, the civil action was ultimately dismissed by the Honorable Charles L. Hardy due to the government's failure to comply with Mr. Crozier's civil discovery requests. (Appendix A, pp. 29-30).

However, on January 15, 1981, while the civil forfeiture action was still pending before Judge Hardy, the government obtained an ex parte restraining order from the Honorable Valdemar A. Cordova, which covered much of the same property seized under the civil forfeiture action, together with some additional property. (Appendix B, pp. 31-35). On March 12, 1981, the government obtained a second ex parte restraining order encompassing almost all of the property already included in both the civil action and the first criminal restraining order, and adding more property. (Appendix C, pp. 36-38). All motions by Ms. Wolke and Mr. Crozier to reconsider the court's ex parte orders and to release some of the property were denied by the district court. On May 13, 1981, the district court denied Mr. Crozier's motion, joined in by Ms. Wolke, to dissolve and/or amend the restraining order. (Appendix D, p. 39). Finally, on May 21, 1981, Ms. Wolke and Mr. Crozier were forced to file bankruptcy proceedings in federal bankruptcy court in order to prevent foreclosure on their home and to salvage their other property as well. Subsequently, the government filedan order to show cause why they should not be held in contempt of court for this action, which was dismissed by the Ninth Circuit on July 23, 1981. (Appendix E, p. 40).

After an interlocutory appeal by Ms. Wolke and Mr. Crozier, the Court of Appeals reversed the district court's ruling. The restraining order was vacated and the case was re-

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2/ This forfeiture case was numbered CIV-80-512-Phx. CLH.

manded to the district court for an evidentiary hearing. See United States v. Crozier, 674 F.2d 1293 (9th Cir. 1982). A Rehearing and Rehearing En Banc was denied and the government's petition for a writ of certiorari followed.

B. Factual Background:

For over two years virtually all of Ms. Wolke's property has been under the government's continual seizure, for the most part accomplished through ex parte restraining orders obtained without any hearing whatsoever, either before or after the orders were granted. Indeed, the government has never supplied any nexus of proof to substantiate its conclusory allegations that Ms. Wolke's personal and real property is subject to forfeiture in connection with a count in the indictment with which she is not even charged.

Specifically, the restraining orders at issue enjoin, prohibit and restrain Ms. Wolke,

> [f]rom selling, assigning, pleading, distributing, giving away, incumbering, or otherwise disposing of or removing from its present location with the intent to conceal and hide from the jurisdiction ... or removing from any checking or savings account, all or any part of [her] interest, indirect or direct, in the property listed ... real, personal or choses in action, without prior approval of the court upon notice to the United States and an opportunity for the United States to be heard ...

(See Appendix B, p. 32 and C, p. 37). Of the property included in the above orders, Ms. Wolke held a joint tenancy interest (with Mr. Crozier) in her residence, 12498 Avenue C, Yuma, Arizona. She also owned a joint tenancy interest in property at 1912 West 18th Place, Yuma, and twenty acres of farmland in Yuma, Arizona. Further, Ms. Wolke owned much of the jewelry which was also seized under these orders and held at the United States Marshal's Office. Finally, Ms. Wolke, owned the 1980 El Dorado and had a joint tenancy interest in the 1970 Bronco and 1979 Toronado, all of which were seized and impounded by the government pursuant to the restraining orders.

As a result of the government's ex parte seizures, Ms. Wolke has been financially destroyed. First, the twenty acres of farmland were foreclosed upon in the Spring of 1981. Second, although Ms. Wolke and Mr. Crozier filed a bankruptcy action in May of 1981, the mortgage on their residence at 12498 Avenue C has already been foreclosed. Finally, until October 4, 1982, Ms. Wolke's jewelry had been under the continual seizure of the United States Marshal's Office.[3/] Since a final mandate has not yet issued from the Ninth Circuit because of the government's petition for certiorari, this restraining order remains in effect at the present time.

II. Motions to Suppress Evidence.

A. Procedural Background:

Ms. Wolke filed a pretrial motion to suppress evidence seized as a result of numerous searches of her person, personal property and home. After an extensive hearing, on July 9, 1981 the district court entered a detailed order stating its findings of fact and law. (Appendix I, pp. 47-52). The court granted those parts of Ms. Wolke's and Mr. Crozier's motions which challenged the April 9, 1980 warrantless search and seizure of their residence. (Id. at p. 50). Also, the Court

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3/ On August 30, 1982, Ms. Wolke filed an emergency motion with the district court for release of the jewelry and El Dorado. Subsequently, a stipulation was entered into with the government, and an order was entered, wherein the jewelry would be returned to Ms. Wolke and she would be able to sell it, but would be required to file sealed monthly accountings with the Court. (Appendix F, pp. 41-44). Ms. Wolke is still prohibited from selling or otherwise disposing of the El Dorado. (Id.). This motion was necessitated by the utter financial desperation of Ms. Wolke after a two year seizure by the government. On October 27, 1982, another emergency motion was filed by Ms. Wolke, this time in the Ninth Circuit, for permission to sell her furniture, since her home was being foreclosed upon and she was put on notice that she would have to vacate the premises. Such motion was granted subject to the same conditions as the stipulation entered into with the government for return of the jewelry. With the proceeds of the sale of some jewelry and furniture Ms. Wolke was able to save her home at 1912 West 18th Place from foreclosure, although proceedings had already been instituted by the mortgage holders. A record of those events is contained in the clerk's office of the Bankruptcy Court in the District of Arizona, No. B-81-1148-YUMA-HMC. (Appendix G, p. 45 and H, p. 46).

suppressed the evidence on the ground that the search warrant's overbreadth together with the execution thereof constituted an unreasonable search and seizure. (Id. at p. 50). Except for the motions to suppress evidence resulting from the search of the Stein house, all the other search and seizure claims were denied by the district court. (Id.)

The government appealed those portions of the order which granted defendant's motion to suppress the evidence obtained as a result of the illegal searches and seizures of their homes, and the court of appeals affirmed the district court's ruling. See United States v. Crozier, supra, 674 F.2d at 1293.

B. Factual Background:

Between April 7 and April 9, 1980, government DEA agents maintained heavy surveillance on the Wolke and Crozier residence at 12498 Avenue C, as well as the homes and persons of other codefendants. (Reporter's Transcript of Suppression Hearing ("R.T.") III 469; IV 487-491; 548-597). Early on April 9, 1982, DEA agents followed Mr. Crozier's automobile, in which Ms. Wolke and two other individuals were passengers, stopped the vehicle, and arrested Crozier (R.T. III 468-470; 515). Ms. Wolke and the other two individuals were permitted to drive away as there was no probable cause for their arrest (R.T. II 205). Indeed, the car was not even surveilled after its release to Ms. Wolke (R.T. II 205, 210-211).

The residence of Crozier and Wolke had been closely watched by DEA agents using vehicles and an airplane on the morning of April 9, 1980 (R.T. II 200-201; 208). Thus, the agents observed Ms. Wolke, Mr. Crozier and the two others leave the residence together on the morning of April 9, 1980 (R.T. II 208). There were no reports of anyone else having entered the residence from the time these four persons left until the time agents made their warrantless entry into Ms. Wolke's residence that same day (R.T. II, 201). These were the only persons known to have been at the residence during that time (R.T. II, 210) and when the agents were ordered to proceed to Wolke's home, there was no information that anyone was on

the premises or that evidence was in the process of being destroyed (R.T. II 272). In the agent's "rush for time" a telephonic search warrant, available under Rule 41, Federal Rules of Criminal Procedure, was never sought (Id.).

DEA agents arrived at Ms. Wolke's residence as early as 1:00 P.M. on April 9, 1980 and searched the residence and guest house without a warrant (R.T. II, 1910; II 98-200).[4/] Since the government had no information indicating that either evidence or persons were in the residence, (R.T. 11 272; II 210) the only purpose of the warrantless entry into the home was "to establish and secure everything that might have any value as evidence in the investigation being conducted by agent Murphy" (R.T. II 192). The fact is, however, that Ms. Wolke's residence could have been secured through less intrusive methods, from a vantage point outside the property itself (R.T. II 197-199). Not until six hours after the warrantless entry and seizure did ten more government agents finally arrive with a search warrant (R.T. I 98). The egregiousness of the government's actions is further aggravated by its failure to mention its warrantless entry, search or seizure in any of its responses to either Ms. Wolke's or Mr. Crozier's motions to suppress. Since neither Mr. Wolke nor Mr. Crozier was present during the illegal search and seizure, and since no government warrants or pleadings mentioned it, they were unaware of the intrusion. However, three witnesses had seen government agents on the property at different times during

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4/ Apparently, the agents entered the home with a key which was seized either from Ms. Wolke's purse or from the ignition of the automobile at the time of Crozier's arrest earlier that day (R.T. II 192, 209; I 165).

the day (R.T. I 88-98; II 191-211).[5/]

Only after the three witnesses testified during the hearing concerning their experiences did the government announce in open court that it had never disputed its warrantless entry into Ms. Wolke's home (R.T. I 98).

The search warrant, obtained after the house had been searched and seized for six hours, authorized the search and seizure of "amphetamine, precursor chemicals, including methylamine, P-2-P, ether and alcohol, and laboratory apparatus, notes, formulas as well as any indicia of ownership and control of the premises" which were material evidence in violation of Title 21 United States §841 and §846. Based on this, ten DEA agents seized almost one-half of all papers located within Ms. Wolke's residence on the rationale that they represented either "indicia of ownership" and "notes" or "fruits of the crime and expenditure of money" (R.T. I 102-104; 126).[6/]

Among the items seized were: greeting cards, real estate papers, life insurance policies, personal letters from children and other relatives of Crozier and Wolke, a death certificate of Ms. Wolke's former husband, Ms. Wolke's confidential medical and social security correspondence, all of Ms. Wolke's bank statements dating back to 1973 (six years before any investigation on the present case had begun), over fifty photographs, hundreds of miscellaneous bills and receipts, and address books (R.T. 1 102-112). At the time these irrelev-

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5/ Albert Brinkerhoff was a workman at the residence. Agents approached him and required him to show his I.D. An agent also admitted to Brinkerhoff that he had seen the inside of the guest house. On the same afternoon, Shawn Crozier, (Clarence Crozier's son) attempted to enter the residence in order to shower and change clothes. He was refused permission by the agents and was required to leave the premises. Finally, Susan Stein (wife of defendant Allen Stein, and daughter of Clarence Crozier) entered the premises to feed the dog. Agents stopped her in the driveway and permitted her to enter the home only for this purpose. However, she was escorted by agents who opened the door for her and followed her inside. Two additional agents then proceeded to enter the home (R.T. I 88-98; II 191-211).

6/ The language of the warrant itself does not authorize the search and seizure of "fruits of the crime" or "expenditures of money" as evidence of a violation of Title 21 United States Code §841 and §846.

lant items were seized, agents did not even know what they were (R.T. I 109). Further, never was the term "notes" defined for the agents before the search and seizure began. Indeed, only a "minor part" of all the evidence seized had a "special significance" to the government's agents, and many innocent papers were taken only because they were located within another box or container which had also been seized (R.T. II 178). All of these papers remain in the custody of the government at the present time and each item has been read, labeled and filed in an "evidence room" of the United States Attorney's Office.

REASONS FOR DENYING THE PETITION

I

SINCE THE LOWER COURT'S DECISION, THAT BEFORE A PERSON'S PROPERTY CAN BE RESTRAINED PRIOR TO TRIAL THERE MUST BE AN ADVERSARIAL HEARING, IS CONSISTENT WITH TRADITIONAL DUE PROCESS REQUIREMENTS UNDER THE FIFTH AMENDMENT, AND WITH RECENT CASE LAW, REVIEW BY THIS COURT IS NOT WARRANTED.

The lower court held that a defendant is entitled to an immediate adversarial hearing when the government obtains a restraining order and seizes property before trial pursuant to Title 21 United States Code §848(d). United States v. Crozier, supra at 1297. Relying in part upon United States v. Long, 654 F.2d 911 (3rd Cir. 1981), the Court reasoned that:

> [b]efore a Court can issue such a restraining order, however, the government must demonstrate that it is likely to convince a jury, beyond a reasonable doubt, of two things: one, that the defendant is guilty of violating the Continuing Enterprise statute and two, that the profits or properties at issue are subject to forfeiture under the provisions of §848(a)(2). See United States Code §848(d).... In addition, these determinations must be made on the basis of a full hearing; the government cannot rely on an indictment alone.

674 F.2d at 1298, quoting United States v. Long, supra, at 915. The Court also applied the standards of Rule 65, Federal Rules of Civil Procedure, since §848(d) "does not specify require-

ments for determining when a restraining order should issue." 674 F.2d at 1297.

The government argues that the requirement of such a pretrial adversarial hearing for the purpose of continuing a restraining order under Title 21 United States Code §848 "has grave practical impact" upon the use of the forfeiture remedy. (See government's brief pp. 10). It further asserts that it conflicts with the federal discovery practices under Rule 16, the Federal Rules of Criminal Procedure. It is also the government's position that the disclosure of its witnesses would force a "dress rehearsal" before trial and that in some cases this exposure would threaten their safety or deter them from testifying at trial.[7/]

Yet, contrary to the government's reasoning, this Court has firmly held that due process protections under the Fifth Amendment of the Constitution must override any expediencies in government procedures when the two interests conflict. In Stanley v. Illinois, 405 U.S. 645, 656 (1972), in the context of custody proceedings, Justice White stated:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. [footnote omitted] Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for

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7/ This argument is unpersuasive in light of the fact that the government has a choice of whether its interest in restraining property is paramount to that of preserving the secrecy of its witness list. Instead, the government desires the best of both worlds. The burden of protecting a witness is the responsibility of the government. A defendant should not be required to forego the basic constitutional right to a hearing when his property has been seized in order to make such a responsibility easier or more expedient for the government. Further, in the present case, it was never alleged that Ms. Wolke threatened the safety of any government witnesses so that the argument is totally irrevelant as to her. Clearly, the fact that there might be such allegations against a codefendant cannot have any bearing on Ms. Wolke's right to due process.

> efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
>
> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disclaims present realities in deference to past formalities, it needlessly risks running rough shod over the important interests of both parent and child. It therefore cannot stand.

See Fuentes v. Shevin, 407 U.S. 67, 90 n. 22 (1972) quoting Stanley v. Illinois, supra; See also, Bell v. Burson, 402 U.S. 535, 540-541 (1971); Goldberg v. Kelly, 397 U.S. 254, 261 (1970). In Ms. Wolke's case, the government's argument that due process is outweighed by the need for efficiency in crime fighting is even weaker, since there is lacking here even the "deference to past formalities" which was present in Stanley v. Illinois, supra. Without question, the government's actions in the present case ran "rough-shod" over Ms. Wolke, since she was deprived of virtually all of her property for over two years without any semblance of due process whatsoever. Thus, in the name of effective deterrence of criminal conduct, Ms. Wolke was financially destroyed before she was even tried for a crime.[8/]

The danger to a "vulnerable citizenry" of the government's position is painfully demonstrated in the present case; the financial ruin suffered by Ms. Wolke can befall any person the government chooses to indict. Weighed against this destruction, the speculation that (a) some of the accused's property might be subject to forfeiture after trial; (b) absent a restraining order, the defendant might dispose of some forfeitable property before trial; (c) the government might be able to trace the proceeds of the property; and (d) the government might

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8/ Moreover, if, as the government asserts, this due process requirement would force prosecutors to stop pursuing such a remedy under §848, it would still have the civil forfeiture remedy available pursuant to §881.

not wish to expose its case in a hearing before trial cannot support a policy of seizing property without the protection of due process.

Such action is particularly egregious in light of the fact that Ms. Wolke is not even named in the continuing criminal enterprise count of the indictment (Title 21 United States Code §848), the section under which the ex parte restraining order was issued. Thus, the property was restrained on the basis of the government's expedient "presumption" that her property was also subject to the restraints of §848(d). Other than a grand jury determination that Ms. Wolke's property was subject to forfeiture, along with Mr. Crozier's, the government was never required to make the necessary showing that its seizure was a proper one. 9/

The government further attempts to defend its ex parte restraining order prior to trial by analogizing such procedure to restraining a defendant's liberty pending trial. This analogy must fail: a defendant is only detained in order to ensure his presence at trial. This procedure has a long history of constitutional validity and is explicitly codified by statute. (Title 18 United States Code §3146). On the other hand, a pretrial seizure of a person's estate is foreign to this country's criminal justice system. Indeed, since the Magna Carta, in personam forfeiture of estate has been historically rejected as a punishment under English jurisprudence. The repugnancy of in personam forfeiture as punishment continued in American jurisprudence as well, for one hundred and eighty

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9/ As stated in the facts, supra, p. 3, prior to obtaining the criminal ex parte restraining orders, the government first instituted civil forfeiture proceedings against the property of Ms. Wolke and Mr. Crozier. However, because counsel for Mr. Crozier filed voluminous discovery requests which the government failed to comply with, the district judge dismissed that civil action. Unlike a criminal seizure, in a civil forfeiture action all discovery tools are open to the aggrieved party, such as interrogatories, depositions, and requests to produce. Therefore, the government's argument that civil forfeiture proceedings constitute a "more significant intrusion" than criminal proceedings is fallacious. No hearing is required in the civil action because the government must adhere to basic civil discovery procedures. Moreover, civil forfeiture procedure is inherently different from the criminal procedure in that it is in rem in character and administrative in function. The government here desires to have it both ways. It dismissed the civil action due to the burdensome discovery requests, and proceeded under an in personam criminal statute ex parte, yet also claims that the defendant is not entitled to an evidentiary hearing.

years, until the enactment of the criminal forfeiture statutes (Title 21 United States Code §848(d) and Title 18 United States Code §1961).

Unlike the restraining of the defendant in order to ensure his presence at trial, the seizure of a defendant's estate is to ensure that such property will be available as a punishment for that defendant after a trial. Under this logic, the government could also seize property in order to assure that the defendant would be able to pay a criminal fine if convicted. Clearly, such reasoning is outside the permissible constitutional interpretation of the Fifth Amendment.[10/]

Thus, the defendant is presumed guilty, and his property is presumed forfeitable, on nothing more than the government's bare allegations that such property is connected to the alleged illegal activity which supports the indictment itself. Such a presumption flies in the face of fairness and ignores the presumption that the defendant is innocent until proven guilty. This type of pretrial seizure of a defendant's property is, by definition, punitive in nature since §848(d) is a penalty provision which comes into play only after a finding of scienter and can only serve the purposes of retribution and deterrence. See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963). See also Bell v. Wolfish, 441 U.S. 520, 538 (1979).

Additionally, the government contends that the Crozier Court incorrectly applied the standards of Rule 65, Federal Rules of Civil Procedure to this case since "criminal forfeitures plainly are governed by the Federal Rules of Criminal Procedure." (See Government's Brief at footnote 12). Such an

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10/ In any event, the government's argument is erroneous on the facts of this case, since it sought to hold Ms. Wolke in contempt of court when she filed for bankruptcy in order to preserve her seized property. As stated in the facts, supra, most of this property was ultimately lost through foreclosures despite Ms. Wolke's efforts to save it, thus denying both the government and Ms. Wolke of its preservation. The government's attempt to hold Ms. Wolke in contempt of court for trying to save her property proves that the pretrial ex parte restraining order was completely punitive in nature. This type of result is directly opposite to that accomplished when a defendant is detained before trial unless he can post bail.

interpretation is completely erroneous. The government cites the Federal Rules of Criminal Procedure 7(c)(2); 32(b)(2) and 54(b)(5) as "excluding civil forfeiture proceeding." Id. Yet, Rule 7(c)(2) and 32(b)(2) are altogether silent on the subject. Moreover, the language of Rule 54(b)(5) states nothing about the application of any civil rule to a criminal proceeding, but merely excludes the criminal rules from civil application. In fact, Crozier applied Rule 65 to this case for the reason that both criminal rules are silent on the proper procedure to be taken and §848(d)(2) itself is ambiguous as to when such restraining orders are to be issued. It is absurd to argue that because the Federal Rules of Criminal Procedure fail to explicitly provide for due process requirements when a defendant's property is seized for forfeiture prior to trial, that no due process should be afforded to him. To the contrary, it is precisely because the the Criminal Rules do not set out procedures which provide due process to a defendant under these circumstances, that the Crozier Court was forced to read the standards of civil procedure into the criminal framework. When legislation does not comport with due process safeguards, it is constitutionally deficient and must be corrected by the courts. See Fuentes v. Shevin, supra. Otherwise, it could always be argued that because a statute or a rule fails to explicitly provide for a due process protection, none should be provided to a person. Such reasoning is patently erroneous and irreconcilable with all established principles of constitutional law.

Much of the government's argument before this Court also centers around the issue of whether the Federal Rules of Evidence apply in a hearing for the purpose of continuing an ex parte restraining order. Yet, such an issue is not even properly before this Court. In fact, the issue of the applicability of the Rules of Evidence was never briefed, argued or

referred to in either the trial court or the court of appeals.[11] However, assuming arguendo that such an issue were properly before this Court, Ms. Wolke asserts that it is not yet ripe, as no circuit has directly considered it.[12]

Finally, the Government argues that certiorari must be granted because only a few cases will survive mootness long enough to reach this Court, and this is an issue of great practical significance in criminal forfeiture cases. Such reasoning ignores the very narrow question at hand: Whether a defendant must be afforded due process, by means of a hearing under §848(d)(2), before the government can continue to seize a defendant's property prior to trial. Such a procedural safeguard in no way prevents the availability of this remedy to the government. There is nothing complex or confusing contained in the standards of Crozier which must be complied with in order to affect a pretrial restraining order under §848. Rather, the Court in Crozier merely sets out basic principles of "fair play" which can only lead to just results in accordance with the Fifth Amendment.

11/ Moreover, the government cites the decision of United States v. Spilotro, 680 F.2d 612, 619 n. 4 (9th Cir. 1982), for the proposition that a hearing must be held in accordance with the Rules of Evidence, which would bar admission of hearsay testimony. However, the Court in Spilotro merely mentioned the application of the Rules of Evidence as dictum in a footnote at the end of the decision. 680 F.2d at 619 n. 4. Nowhere in the decision itself is the admissibility of hearsay discussed. Further, the decision does nothing more than affirm the reasoning of United States v. Crozier, supra, in requiring a full evidentiary hearing before the government can continue to seize property for forfeiture prior to trial under an ex parte restraining order.

12/ It should be noted, that the government's interpretation of Rule 1101(d)(3), Federal Rules of Evidence, is not correct. Rule 1101(b) specifically provides that these rules "apply generally to ... criminal cases and proceedings. (emphasis added). Therefore, unless an exception applies under Rule 1101(d) or (e), Rule 802 of the Federal Rules of Evidence, which bars hearsay, would apply to an evidentiary hearing under Title 21 United States Code §848(d). The government attempts to argue that Rule 1101(d)(3) (an exception for preliminary examinations) covers this type of hearing. However, it cites no authority whatsoever for such a proposition. To the contrary, a better view is that the preliminary examinations to which Rule 1101(d)(3) refers are only those provided for in the Federal Rules of Criminal Procedure, Rule 5(c). See United States v. Veon, 538 F. Supp. 237, 248-49 (E.D. Cal. 1982). Further, the fact that in United States v. Long, supra, an evidentiary hearing was conducted by a government agent in the form of hearsay is not dispositive of the issue. There, the question of admissibility of hearsay evidence was not challenged on appeal, nor did the decision ever mention the argument. Also, hearsay is properly admitted into evidence if it is not objected to by the opposing party. Thus, if the defendant in Long never objected to this type of testimony, it would have been properly admitted. See United

In effect, the government's assertion is that if the criminal forfeiture provisions must meet due process requirements it will choose to eliminate such punitive pretrial procedures. Thus it asks the Court to exempt these forfeiture provisions from the application of Fifth Amendment in order that it will be less difficult to seize a person's property and punish him before he has been convicted of a crime. Such an argument does not provide an adequate reason for this Court to grant certiorari. To the contrary, it is in direct contravention of established Supreme Court case law in this regard. See Fuentes v. Shevin, supra, and cases cited therein. Moreover, the government has not demonstrated that this is an issue which lower courts have had a substantial problem in resolving. Thus, the fact that cases will have become moot before reaching this Court is insignificant, in and of itself. Indeed, if future case law continues to be consistent with United States v. Crozier, supra and United States v. Long, supra, it may never be necessary for this Court to reach the question.

In conclusion, Ms. Wolke submits that the lower court's holding is in complete harmony with this Court's decision in-interpreting the requirements of due process in connection with government seizure of a person's property. Indeed, the petitioner's brief utterly fails to acknowledge this court's repeated disapproval of the government's summary seizure of a person's property without a hearing. Fuentes v. Shevin, supra, 407 U.S. 67; C.I.R. v. Shapiro, 424 U.S. 614 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); North Georgia Finishing Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975). "[I]t has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.' " (citations omitted). Fuentes v. Shevin, supra, 407 U.S. at 81. Yet the government's action in the present case is, in fact, a product of such secrecy and one-sided determination. Such ex parte action on the part of the govern-

ment has served to deprive Ms. Wolke of her property without due process of law for over two years. Finally, the Second Circuit's decision on the issue in United States v. Long, supra, is in perfect accord with the Ninth Circuit view. Since no other appellate case law has yet developed, the issue is not yet ripe for this Court's review and the government's petition for certiorari should be denied.

II

THE LOWER COURT'S DECISION SUPPRESSING EVIDENCE BECAUSE OF THE ILLEGAL SEIZURE OF MS. WOLKE'S HOME FOR SIX HOURS PRIOR TO THE ARRIVAL OF A SEARCH WARRANT IS COMPLETELY CONSISTENT WITH THE BASIC FOURTH AMENDMENT GUARANTEE OF A CITIZEN'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES, TOGETHER WITH THIS COURT'S INTERPRETATION OF SUCH GUARANTEES.

The analysis of United States v. Allard, 634 F.2d 1182 (9th Cir. 1980), one of the cases upon which the decision below was based, reflects this Court's own view of Fourth Amendment interpretation:

> The Fourth Amendment, it must be remembered, prohibits both unlawful searches and unlawful seizures. Here again the ultimate question to be resolved is whether 'the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Wong Sun v. United States, supra, at 488, 83 S. Ct. at 417 (footnote omitted)

634 F.2d at 1185. In strictly adhering to both the language of the constitution itself and this Court's view of that language's meaning, the Ninth Circuit correctly concluded that the government's illegal entry of a person's hotel room constituted not only a search, but also a seizure. Id. Thus, Allard couched its reasoning within the framework of a continuing illegal seizure of evidence prior to the issuance and execution of a search warrant. It concluded that when government agents illegally and continually "secured" a person's hotel room for three hours while other agents procured a warrant, evidence

obtained after the warrant's issuance was correctly suppressed.

> Accordingly, we hold that where a defendant establishes that the government illegally 'secured' and thereby seized evidence, and that seizure continues while the government procures a search warrant, the defendant has demonstrated a sufficient nexus between the illegality and the subsequently seized evidence notwithstanding any 'independent source' supporting the warrant. Upon establishing this nexus, the burden shifts to the government to demonstrate that it would have both independently discovered and successfully obtained the proffered evidence notwithstanding the illegal seizure.

634 F.2d at 1187. In the present case, Ms. Wolke established, and the government concedes to this Court (government's petition, footnote 14), that there were no exigent circumstances which would have legitimized the government's action of seizing her home for over six hours until a warrant arrived. Further, the government failed to show that it would have "successfully obtained" the proffered evidence despite the illegal seizure. Finally, aside from the warrant itself (obtained six hours after the fact) the government failed to demonstrate that it would have "independently discovered" such evidence, notwithstanding the illegal seizure. Id.

The government asserts in its petition that the eventual issuance and exercise of the search warrant serves to sever the illegal six hour seizure from the post-warrant evidence. In effect, the government seeks to narrow the Fourth Amendment issue into the technical question of whether a facially valid search warrant can, in and of itself, retroactively validate prior illegal police action, thus allowing the admission into Court of illegally seized evidence.

Unless the answer to this question is in the negative, such a rationale would all but abrogate the effectiveness of the Fourth Amendment, which guarantees the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." This Court has consistently expressed a firm commitment to the protection of individuals represented by a broad interpretation of that

language. In United States v. Chadwick, 433 U.S. 1, 7-8 (1977) it stated:

> It cannot be doubted that the Fourth Amendment's commands grew in large measure out of colonists' experience with the writs of assistance and their memories of the general warrants formerly used in England. These writs which were issued on executive rather than judicial authority, granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods. Though the authority to search granted by the writs was not limited to the home, searches conducted pursuant to them often were carried out in private residences. See generally, Stanford v. Texas, 379 U.S. 476, 481-485 (1965); Marcus v. Search Warrant, 367 U.S. 717, 724-729 (1961); Frank v. Maryland, 359 U.S. 360 (1959). (Emphasis added)13/

See also, Johnson v. United States, 333 U.S. 10, 13-14 (1948). Indeed, more than a half century ago, this Court decided that property illegally seized from a person's home could not be used as evidence against him in a court of law. United States v. Weeks, 232 U.S. 383 (1914). In reaching this holding, the Court relied on the principles enunciated in still earlier decisions of the Supreme Court:

> In the Boyd Case, supra, after citing Lord Camden's judgment in Entick v. Carrington, 19 Howell's State Trials, 1029, Mr. Justice Bradley said (630):
>
> 'The principals laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitute the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where the right has never been

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13/ In its petition, at p. 18, the government incorrectly applies Chadwick to the analysis of the present case. There, a trunk was seized from an automobile. Nowhere in the decision does this Court discuss the warrantless entry and seizure of a home in the absence of exigent circumstances.

> forfeited by his conviction of some public offence, -- it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.'
>
> In Bram v. United States, 168 U.S. 532, this court in speaking by the present chief justice of Boyd's Case, dealing with the Fourth and Fifth Amendments, said (544):
>
> 'It was in that case demonstrated that both of these amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principals of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change.'

232 U.S. at 391. Based upon this precedent, the Court in Weeks further concluded that:

> [T]his protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, ... should find no sanction in the judgment of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

232 U.S. at 392. Clearly, if a Court were to sanction the government's action here, it would also be an affirmance by judicial decision of "manifest negligence if not an open defiance of the prohibitions of the constitution intended for the protection of the people against such unauthorized action." Id. at 394.

Indeed, most recently, this Court has explicitly condemned warrantless searches and seizures of a person's home:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimension's of an individual's home -- a zone that finds its roots in clear and specific

> constitutional terms: 'the right of the people to be secure in their ... houses ... shall not be violated.' That language unequivocally establishes the proposition that '[a]t the very core of [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion.' Silverman v. United States, 365 U.S. 505, 511. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton v. New York, 445 U.S. 573, 589-590 (1980). Thus, the lower court's decision in Ms. Wolke's case is in complete harmony with the long established principles developed by this Court.

None of the cases cited by the government attempt to come to grips with the issue of "taint" following a continual illegal seizure of a person's home. Further, none of those cases concentrate their analysis on the "seizure" aspect of the illegal police conduct.[14/]

14/ In United States v. Fitzharris, 633 F.2d 416 (5th Cir. 1980), the Court only addressed the issue of an illegal search and arrest prior to the arrival of a valid warrant. In United States v. Beck, 662 F.2d 527 (8th Cir. 1981), the Court referred to the officer's illegal "entry" prior to the issuance of the warrant, but failed to categorize it as either a search or a seizure. In addition, that case was factually distinguishable from the present case, as the issue of "exigent circumstances" was not even examined by the Court. See 662 F.2d at 530. In United States v. Kinney, 638 F.2d 941 (6th Cir. 1981), the issue centered around an arrest outside the residence and a subsequent search inside preceding a valid warrant. Thus, no continued seizure was involved there. In United States v. Bosby, 675 F.2d 1174 (11th Cir. 1982) the police illegality involved an inventory search of an automobile and the illegal possession and search of suitcases found within it. Again, the Court made no attempt to examine the question of "taint" which arose from such a continuing seizure of the baggage, but concentrated upon the effect of the previous illegal search on the subsequent search pursuant to a warrant. Finally, the facts of United States v. Torgersen, 695 F.2d 682 (8th Cir. 1982) are in no way applicable to Ms. Wolke's case. There, a justified initial entry was made by a fireman pursuant to an emergency call. Subsequently, a warrantless search was conducted by a detective, prior to the arrival of a valid warrant. Again, there was no continuing illegal seizure involved.

In fact, of the cases cited by the government, only United States v. Segura, 663 F.2d 411 (2nd Cir. 1981) appears to conflict on both the law and the facts with the present case. But there too, the Court fails to directly address the issue of an "entry" constituting not only a search but also a seizure. Although the Court in Segura does discuss the fact that agents remained on the defendant's premises approximately nineteen hours prior to the arrival of the warrant, that is where the discussion ends. No attempt is made to examine the question of whether the continuous nineteen hour seizure of the premises "tainted" the post-warrant evidence which was subsequently obtained. Further, Segura fails to examine the inherent dangers of permitting police to unlawfully remain in a person's residence, with no penalty of suppression of evidence or other deterrence for such illegal conduct.

This is precisely what the Ninth Circuit has addressed. In United States v. Allard, supra, the Court wisely followed the reasoning of United States v. Griffin, 502 F.2d 959 (6th Cir. 1974), cert. denied 419 U.S. 1050 (1974), which held that the assertion by police that their discovery was "inevitable" because they planned to get a search warrant and an officer had already gone on such a mission "would as a practical matter be beyond judicial review." 502 F.2d at 961. Moreover, if police were permitted to assert that the evidence was obtained from an "independent source" every time they illegally seized a person's home before a warrant arrived, the warrant requirement would be reduced to an expost facto formality. United States v. Allard, supra, 634 F.2d at 1185, n. 3, quoting Griffin, supra.

Clearly, under Wong Sun v. United States, 371 U.S. 471 (1963), the continuing illegal entry and seizure of Ms. Wolke's home for six hours, in which no break in the chain of events occurred, must "taint" the subsequent search and seizure of evidence pursuant to the warrant. The ultimate search was "come at by the exploitation of that illegality" since the illegal seizure continued up until the exact time the warrant actually arrived. Moreover, the government made no showing that

that it would have "successfully obtained" and "independently discovered" such evidence despite the warrantless seizure. United States v. Allard, supra at 1187.

To allow the government to proceed on an "independent discovery" argument alone would emasculate the concept of exigent circumstances as applied to the Fourth Amendment. For example, police could illegally enter homes and remain for as long as they desired while they awaited the arrival of a search warrant on a theory of "exigent circumstances". Then, if the Court found that no exigent circumstances were, in fact, present, the government could always defend its action on the mechanical application of the "independent source" doctrine. Clearly, this type of reasoning only circumvents the requirement that absent exigent circumstances an entry into a home must be preceded by a search warrant.

Without the threat of suppression of evidence for blatantly illegal conduct, police will have the absolute power to move in and seize people's homes when they so desire, as long as "eventually" a search warrant is obtained. At this point, Ms. Wolke asks the rhetorical question: How long can police remain in absolute possession of a person's home while awaiting a warrant -- twenty-four hours, forty-eight hours, one week?

It is submitted that the lower court's analysis of search and seizure law, as applied to the facts of Ms. Wolke's case, is completely consistent with this Court's philosophy and decisions. Moreover, even assuming arguendo that United States v. Segura, supra, conflicts with the lower court's decisions in this case, the conflict is not of a such a broad magnitude as to require this Court to accept certiorari on the question presented. The government's petition should, therefore, be denied.

III

THE LOWER COURT'S HOLDING THAT THE SEARCH WARRANT FOR THE CROZIER/WOLKE RESIDENCE WAS IMPERMISSIBLY GENERAL AND ALLOWED THE SEIZURE OF MANY IRRELEVANT PAPERS DOES NOT CONFLICT WITH OTHER CIRCUIT DECISIONS OR WITH THIS COURT'S MANDATE THAT GENERAL WARRANTS VIOLATE THE FOURTH AMENDMENT.

At the suppression hearing, Judge Valdemar A. Cordova heard the description and volume of evidence actually searched and seized pursuant to a broad warrant. (See facts, supra, at p. 8, for description of warrant). Specifically, almost one-half of all papers located within Ms. Wolke's home were seized by DEA agents under the rationale that they represented "notes" or "indicia of ownership" (R.T. I 102-104). Alternatively, the government relied on the rationale that this massive seizure resulted from the need to seize "fruits of the crime and expenditures of money", a purpose which was not even authorized in the warrant itself (R.T. I 126).

The district judge ruled that the warrant was overbroad and that its execution constituted an unreasonable search and seizure under the law. In reaching this conclusion the district judge reasoned:

> The search warrant does not state what notes and formulae, nor does it indicate guidelines for the type of documents or physical evidence which constitute indicia of ownership or control of the premises.

(See Appendix I, p. 50). This finding was affirmed by the Ninth Circuit Court of Appeals. See United States v. Crozier, supra, 674 F.2d at 1298. Indeed, the facts developed at the evidentiary hearing supported this conclusion.[15/] In fact,

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15/ See facts, supra, p. 9. DEA Agent Cash admitted that only a "minor part" of all evidence seized had any special significance to him and that many innocent items were taken because they were located in another box or container which was also seized (R.T. II 178). Moreover, the word "notes" was never defined for him and he received no instructions from his superiors as to which "notes" should have been taken, prior to the warrant's execution.

agents testified they knew that Mr. Crozier and Ms. Wolke owned the residence prior to their application for the search warrant and had observed these owners physically at the residence on other occasions (R.T. I 106). Under these circumstances, any claim that the papers were seized as "indicia of ownership" authorized by the warrant is illogical.

The government relies on the authority of Andresen v. Maryland, 427 U.S. 463, 479-482 (1976) in asserting that the search warrant's description met the specificity standards of this Court. This reliance is mistaken. In Andresen, the warrant on its face described with particularity every document which was to be seized in connection with a specific transaction. 427 U.S. at 480. Moreover, this Court in Andresen made clear that a warrant authorizing the search and seizure of a person's papers is extremely vulnerable to a violation of Fourth Amendment guarantees:

> We recognize that there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to deterime whether they are, in fact, among those papers authorized to be seized. Similar dangers, of course, are present in executing a warrant for the 'seizure' of telephone conversations. In both kinds of searches, responsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.

427 U.S. at 482 n. 11.[16/] In the present case,

16/ In this regard, the government also relies upon the holdings of United States v. Smith, 686 F.2d 234 (5th Cir. 1982) and United States v. Cortellesso, 601 F.2d 28 (1st Cir. 1979). Both cases are distinguishable because, as in Andresen v. Maryland, supra, the warrants were extremely detailed on their face. In Smith, the search warrant was for a vehicle and described the exact physical and documentary evidence to be seized which related to a particular transaction. 686 F.2d at 237. In Cortellesso, the warrant was for a clothing store and also referred to specific physical items and documents which were connected with a particular transaction. 601 F.2d at 30. Neither of these cases dealt with the search of a home or with the authority to search and seize a person's most personal papers within that home, pursuant to the broad language of a warrant which on its face failed to list any particular documents or papers.

no such assurance was provided by virtue of the broad description of the warrant itself and the subsequent general seizure which included most of Ms. Wolke's personal and confidential papers. See, United States v. Cardwell, 680 F.2d 75, 77 (9th Cir. 1982), for this same proposition.

Contrary to the government's position, this Court has consistently held that warrants must particularly describe items to be seized, in order to ensure the impossibility of general searches under them and to prevent "the seizure of one thing under a warrant describing another." Stanford v. Texas, 379 U.S. 476, 485 (1965); Marron v. United States, 275 U.S. 192, 196 (1927); Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971); Andresen v. Maryland, supra, 427 U.S. 463 at 480. Indeed, "as to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Id.

In complete contravention of this Court's mandate, the government obtained a facially overbroad warrant for the search of Ms. Wolke's home and proceeded to seize literally hundreds of papers, most of which were completely innocuous and unrelated to the alleged crime. These facts present a classic case of a sweeping search and seizure under a general warrant which is repugnant to the Fourth Amendment.

The government expresses its fear that the invalidation of similar warrants "if followed, will severely limit the ability of law enforcement agents to seize, pursuant to a warrant, incriminating evidence from a known sight of criminal activity." (government's petition for certiorari at page 21). Ms. Wolke responds that if such police techniques were to be sanctioned by this Court, the right of the people under the Fourth Amendment to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" would cease to exist except as an abstract philosophical value. Although, under the government's reasoning, police would be given nearly unbridled power and authority to zealously pursue crime, in this battle Fourth Amendment freedom would most certainly be destroyed.

In conclusion, the government has failed to demonstrate that the lower court's decision on this issue conflicts with any other circuit holding or applicable decisions of this Court. Therefore, the government's petition for certiorari on this question should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted: January 19, 1983.

TOM O'TOOLE
Federal Public Defender
District of Arizona

Sandra Lynn Slaton

SANDRA LYNN SLATON
Asst. Federal Public Defender

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-819

UNITED STATES OF AMERICA, PETITIONER

-vs-

CLARENCE JAY CROZIER AND
FLORENCE MARGARET WOLKE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AFFIDAVIT OF SERVICE

TOM O'TOOLE, being first duly sworn, under oath, deposes and says:

(1) That he is a member of the Bar of this Court:

(2) That pursuant to Rule 28.2 and 28.4(a), Supreme Court Rules, he has served a copy of the documents listed below on the United States Attorney for the District of Arizona, Phoenix, Arizona, and;

(3) He has forwarded by priority mail the documents listed below to the Solicitor General, Department of Justice, Washington, D.C. 20530; and to Richard Hove, One Kaiser Plaza, Suite 1101, Oakland, California, 94512 on this 19th day of January, 1983:

The documents provided to the above parties are as follows:

(A) Motion for Leave to Proceed in Forma Pauperis;

(B) Opposition to the Petition for Writ of Certiorari;

(C) Affidavit of Service;

(D) The Mailing and Service of the above took place on the 19th day of January, 1983, within the time permitted by Rule 20.1, Supreme Court Rules.

Tom O'Toole
TOM O'TOOLE
Federal Public Defender
District of Arizona

SUBSCRIBED AND SWORN to before me this 19th day of January, 1983.

NOTARY PUBLIC

My Commission Expires:
My Commission Expires June 6, 1986

(39)

A. BATES BUTLER III
UNITED STATES ATTORNEY
DISTRICT OF ARIZONA

JOSE deJESUS RIVERA
Assistant United States Attorney
4000 United States Courthouse
230 North First Avenue
Phoenix, Arizona 85025
Telephone: (602) 261-3941

LODGED
MAR 20 1981
W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FILED
MAR 23 1981
W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
By _____ DEPUTY CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

80-512

UNITED STATES OF AMERICA,

Plaintiff

v.

CIV ~~81~~ PHX CLH

ONE 1979 FORD BRONCO, VIN U15SLFC5304, its tools and appurtenances; ONE 1979 OLDSMOBILE TORONADO, VIN 3Z57N9E124892, its tools and appurtenances; ONE SINGLE FAMILY RESIDENCE known as 12498 AVENUE C, YUMA, ARIZONA, more particularly described as Parcels 7, 8, and 10 of the Northeast Quarter of Map 13, Book 103, Yuma County, Arizona; ONE SINGLE FAMILY RESIDENCE known as 5417 FRANCIS STREET, YUMA, ARIZONA, more particularly described as Parcel 019, Map 38 Book 111, Yuma County, Arizona; ONE SINGLE FAMILY RESIDENCE KNOWN as 5286 FRANCIS STREET YUMA, ARIZONA, more particularly described as Parcel 039, Map 38, Book 111, Yuma County, Arizona; ONE SINGLE CONDOMINIUM known as UNIT #28, 2490 YOWELL COURT, YUMA, ARIZONA, more particularly described as Parcel 028, Map 84, Book 110, Yuma County, Arizona; ONE SINGLE FAMILY RESIDENCE known as 1912 WEST 18TH PLACE, YUMA, ARIZONA, more particularly described as Parcel 8, Map 24, Book 109, Yuma County, Arizona; ONE UNIMPROVED LOT, NO. 20 of the VALLEY CITRUS ESTATES, further described in Book 5 of Plats Page 108; TWENTY ACRES OF FARMLAND, more particularly known as Parcels 9, 13, 14 and 15 in Northeast Quarter of Map 13, Book 103 Yuma County, Arizona; and VARIOUS ARTICLES OF JEWELRY AND COINS,

Defendants.

O R D E R

APPENDIX A

Upon Motion of the United States, and good cause appearing;

IT IS ORDERED that the matter entitled United States v. One 1979 Ford Bronco, et. al. be dismissed without prejudice.

DATED this 23 day of March, 1981.

CHARLES L. HARDY
UNITED STATES DISTRICT JUDGE

FILED

JAN 16 1981

CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY J. LaVisa
DEPUTY CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, -vs- CLARENCE JAY CROZIER, a/k/a C. J. Crozier, et al, Defendants.	NO. CR-81-019-PHX-VAC O R D E R

This matter having come on motion of the United States of America for a restraining order and establishment of a performance bond pursuant to Section 848 (a) and (d) of Title 21, United States Code, which provides for jurisdiction to enter restraining orders and take such other actions including the acceptance of satisfactory performance bonds in connection with any property or other interest subject to forfeiture pursuant to Section 848 (a)(2) of Title 21, United States Code; Section 1651 of Title 28, United States Code; and this Court's inherent power to make orders necessary and proper to the orderly carrying on of litigation brought within the Court's jurisdiction;

This Court finds that, if this Court fail's to enter this order as prayed for by the United States, that upon Clarence Jay Crozier learning that the property listed below is subject to forfeiture upon conviction on Count II, that Clarence Jay Crozier, a/k/a C. J. Crozier, or his agents, servants, employees, attorneys, family and those persons in active concert or participation with

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him might sell, alienate, encumber, transfer, or otherwise place the property beyond the jurisdiction of this Court or detrimentally affect the Government's interest in such property, thereby frustrating the ends of justice and causing irreparable harm to the United States by defeating such forfeiture.

IT IS HEREBY ORDERED that Clarence Jay Crozier, a/k/a C. J. Crozier; Florence Margaret Wolke, a/k/a Florence Crozier; Alan Terry Stein; Susan D. Stein; John Richard Crozier; their agents, servants, employees, attorneys, family members, and those persons in active concert or participation with them, be and are hereby enjoined and restrained from selling, assigning, pledging, distributing, giving away, encumbering, or otherwise disposing of, or removing from its present location, with the intent to conceal and hide from the jurisdiction of this Court or removing from any checking or savings account, all or part of their interest, direct or indirect, in the property listed below, real, personal, or choses in action, without prior approval of the Court upon notice to the United States and an opportunity for the United States to be heard, except as specified in this Order.

IT IS FURTHER ORDERED that the property which shall be subject to this Order shall include the following, which is all subject to forfeiture upon conviction on Count II of the captioned indictment, such property allegedly being profits obtained by Clarence Jay Crozier, a/k/a C. J. Crozier, in the charged enterprise and/or property affording a source of influence over such enterprise:

1. The real property, with all buildings, structures, fixtures, furnishings and appurtenances, known as 12498 Avenue C, Yuma, Arizona, together with approximately 35 acres adjacent thereto:

2. The real property, with all buildings, structures, fixtures, furnishings and appurtenances, known as 1912 West 18

Place, Yuma, Arizona;

3. The real property, with all buildings, structures, fixtures, furnishings and appurtenances, comprised of approximately 228 acres in Mora County, New Mexico, purchased by Clarence Jay Crozier in March, 1980 from Jerry Hooper, further described in the copy of the warrenty deed attached hereto as Exhibit "B";

4. Various articles of jewelry, coins and related articles seized on April 9 and 10, 1980 from a 1978 Ford LTD, Arizona license WKX-310, and from a 1980 Cadillac El Dorado, Arizona license WHK-345, which items are at present in the custody of the United States Marshal's Service pursuant to seizure, pursuant to Civil Case No. 80-512-PHX-CLH;

5. A 1979 Ford Bronco, California license number 185ZUR;

6. A 1979 Oldsmobile Toronado, California license number 598-XGB;

7. A 1980 GMC pickup truck, Arizona license number 3AX-725;

8. A 1978 Ford LTD, Arizona license number WKX-310;

9. A 1980 Cadillac El Dorado, Arizona license number WHK-345;

10. Tractor, plow, disc equipment and other farm equipment purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a C. J. Crozier;

11. A 1979 Chevrolet Caprice, California license number 277-UAB;

12. One hay hauler, located at 12498 Avenue C, Yuma, Arizona, or purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a/ C. J. Crozier;

13. One white trailer and hitch, located at 12498 Avenue C, Yuma, Arizona, or purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a C. J. Crozier;

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APR 1978

14. One horse trailer, located at 12498 Avenue C, Yuma, Arizona, or purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a C. J. Crozier;

15. One white and green travel home, located at 12498 Avenue C, Yuma, Arizona, or purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a C. J. Crozier;

16. One boat, located at 12498 Avenue C, Yuma, Arizona, or purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a C. J. Crozier;

17. Laboratory apparatus, chemicals, and related items seized on April 9, 1980 from the guest house at the property known as Home Ranch, Inc., having the mailing address of Route 1, Box 120, Wellton, Arizona;

18. Any and all other real or personal property, wherever located, obtained or controlled by Clarence Jay Crozier, a/k/a C. J. Crozier, subject to forfeiture pursuant to the provisions of Section 848 (a)(2) of Title 21, United States Code, including, but not limited to currency, and banking and savings accounts obtained or controlled by Clarence Jay Crozier, a/k/a C. J. Crozier.

IT IS FURTHER ORDERED that prior approval of the Court is unnecessary only if it is necessary to use the property, real, personal, or choses in action, to pay for normal and average living expenses for Clarence Jay Crozier, a/k/a C. J. Crozier, and any lawful dependents supported by Clarence Jay Crozier, a/k/a C. J. Crozier, on the date of the entry of this Order, including food, clothing, normal and average household expenses, medical care, utilities, normal and average expenditures for the upkeep of vehicles, and normal and average expenses for the care of animals located on the property known as 12498 Avenue C, Yuma, Arizona, and the adjacent fifteen acres purchased by Clarence Jay Crozier, a/k/a C. J. Crozier, on or about February 14, 1979. Any expenses

or expenditures in doubt should first be approved by the Court.

The Court will hear from the Government and from the defending party as soon as possible at a date to be set by the Court, on the question of the establishment of a performance bond as prayed for in the Government's Motion.

SO ORDERED this 16th day of January, 1981.

Thelesman G. Gordon
UNITED STATES DISTRICT JUDGE

One copy of Government's Motion for Restraining Order and Establishment of Performance Bond and one copy of Declaration in Support of Motion, etc., and thirty certified copies of Order delivered to U.S. Attorney on January 20, 1981, at the request of Billie A. Rosen, Assistant U. S. Attorney.

W. J. FURSTENAU, Clerk

By P. L. Martin
P. L. Martin, Deputy

LODGED
MAR 12 1981
W. J. PURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FILED
Mar 18 4 55 PM '81
W. J. PURSTENAU, CLERK
U.S. DISTRICT COURT FOR THE
DISTRICT OF ARIZONA
BY [illegible] DEPUTY CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, v. CLARENCE J. CROZIER, et al., Defendants.	CR-81-019-PHX-VAC O R D E R

This Court having considered the Government's Motion to Adopt Seizures and Supplement and Addend Restraining Order filed on March 11, 1981, this Court finds that there is probable cause to believe that Clarence J. Crozier may have an interest in the real property commonly known as Lot #20, Valley Citrus Estates, Yuma, Arizona, and 2490 Yowell Court, Unit #28, Yuma, Arizona, which interest may be subject to forfeiture under Count II of the indictment in the captioned case.

This Court finds that, if this Court fails to enter this order as prayed for by the United States, that upon Clarence J. Crozier learning that the property listed below is subject to forfeiture upon conviction on Count II, that Clarence J. Crozier, also known as C. J. Crozier, or his agents, servants, employees, attorneys, family, and those persons in active concert or participation with him might sell, alienate, encumber, transfer, or otherwise place the property beyond the

COURTRAN

jurisdiction of this Court or detrimentally affect the Government's interest in such property, thereby frustrating the ends of justice and causing irreparable harm to the United States by defeating such forfeiture.

IT IS HEREBY ORDERED that Clarence J. Crozier, also known as C. J. Crozier; Florence Margaret Wolke, also known as Florence Crozier; Alan Terry Stein; Susan D. Stein; John Richard Crozier; their agents, servants, employees, attorneys, family members, and those persons in active concert or participation with them, be and are hereby enjoined and restrained from selling, assigning, pledging, distributing, giving away, encumbering, or otherwise disposing of, or removing from its present location, with the intent to conceal and hide from the jurisdiction of this Court or removing from any checking or savings account, all or part of their interest, direct or indirect, in the real property listed below, real, personal, or choses in action, without prior approval of the Court upon notice to the United States and an opportunity for the United States to be heard, except as specified in this Court's previous order of January 16, 1981:

1. The real property, with all buildings, structures, fixtures, furnishings and appurtenances, known as Lot #20, Valley Citrus Estates, Yuma, Arizona.

2. The real property, with all fixtures, furnishings and appurtenances, known as 2490 Yowell Court, Unit #28, Yuma, Arizona.

IT IS FURTHER ORDERED that the seizure of the real and personal property listed below be adopted from the civil actions previously filed by the United States (CIV-80-510-PHX, CIV-80-511-PHX and CIV-80-512-PHX) to the captioned case and that the United States Marshal's Service retain, as seized property on behalf of the United States, such real and personal property listed below pending outcome of the litigation on the instant indictment:

1. One 1980 Cadillac El Dorado, Arizona license #WHX-345, VIN #6L57NAE608456 (CIV-80-510-PHX);

2. One 1980 GMC 3/4-ton pickup truck, Arizona license #3AX-725, VIN #TKL24AJ500440 (CIV-80-511-PHX);

3. One 1979 Ford Bronco, California license #185-ZUR, VIN #U15SLFC5304, its tools and appurtenances (CIV-80-512-PHX);

4. One 1979 Oldsmobile Toronado, California license #598-XGB, VIN #3Z57N9E124892, its tools and appurtenances (CIV-80-512-PHX);

5. Real property known as 12498 Avenue C, Yuma, Arizona, more particularly described as Parcels 7, 8 and 10 of the northeast quarter of Map 13, Book 103, Yuma County, Arizona;

6. Real property known as 1912 West 18th Place, Yuma, Arizona, more particularly described as Parcel 8, Map 24, Book 109, Yuma County, Arizona;

7. Real property comprised of twenty acres of farmland, more particularly described as Parcels 9, 13, 14 and 15 in the northeast quarter of Map 13, Book 103, Yuma County, Arizona;

8. Real property known as one unimproved Lot #20 of the Valley Citrus Estates, further described in Book 5 of Plots, page 108, Yuma County, Arizona;

9. Real property known as 1490 Yowell Court, Unit #28, Yuma, Arizona, more particularly described as Parcel 028, Map 84, Book 110, Yuma County, Arizona.

DATED this 12th day of March, 1981.

Waldemar A. Cabou
United States District Judge

cc:
U.S. Marshal ( )
Probation ( )
U.S. Attorney ( )
Probation ( )
Atty for Deft ( )
Defendant ( )
J.S.O. ( )
Order Book ( )
Other: ( )
CRD's Initials:
Date: Nov 19 1980

(438)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DATE May 13, 1981

UNITED STATES OF AMERICA,

PLAINTIFF,

vs.

No. CR 81-019 PHX VAC

CLARENCE JAY CROZIER,

DEFENDANT.

This matter having been under advisement,

IT IS ORDERED denying Defendant Clarence Jay Crozier's Motion for Dissolution of Restraining Order and/or Amendment Thereof; said motion is joined in by defendant Florence Margaret Wolke.

FILED
MAY 13 4 35 PM '81
W.J. FURSTENAU, CLERK
U.S. DISTRICT COURT FOR THE
DISTRICT OF ARIZONA
BY [illegible]
DEPUTY CLERK

cc: All counsel of record

Valdemar A. Cordova
VALDEMAR A. CORDOVA
United States District Judge

COURTRAN

APPENDIX D

RECEIVED
JAN 17 1983
FEDERAL PUBLIC DEFENDER
DISTRICT OF ARIZONA

FILED
JUL 27 1981
W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY J. Landies
DEPUTY CLERK

FILED
JUL 23 1981
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. FLORENCE MARGARET WOLKE, Defendant-Appellant.	No. 81-1355 DC# CR-81-19-11 VAC Arizona (Phoenix) ORDER

Before: TANG, FARRIS, and CANBY, Circuit Judges

The court having determined that appellant's notice of appeal was timely filed pursuant to the district court's order of June 8, 1981, the July 22, 1981 order remanding this appeal to the district court is vacated.

Appellee's motion to dismiss this appeal for lack of jurisdiction is referred to the panel that hears this case on its merits.

Appellee's emergency motion for an order to show cause why appellant should not be held in contempt for violation of the district court's restraining order is dismissed. Resolution of this question is for the district court in the first instance. Furthermore, the district court retains jurisdiction to proceed with the trial on the merits of the action currently scheduled for September 1981. See 9 Moore's Federal Practice, ¶ 203.11 at 3-54 (2d ed. 1980).

Appellee's motion to consolidate this appeal with appeal 81-1345 is granted. Appellee's motion to expedite the consolidated appeals is granted, and the parties shall comply with the briefing schedule established in appeal 81-1345 by the order of July 22, 1981.

RECEIVED
JUL 27 1981
W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

COURTRAN

A. MELVIN McDONALD
United States Attorney
District of Arizona

BILLIE A. ROSEN
Assistant United States Attorney
4000 United States Courthouse
230 North First Avenue
Phoenix, Arizona 85025
Telephone: (602) 261-3953

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, v. FLORENCE MARGARET WOLKE, Defendant.	CR-81-019-PHX-VAC STIPULATION FOR RELEASE OF PROPERTY

The United States of America, by and through its attorneys undersigned, and the defendant Florence Margaret Wolke, by her counsel, Sandra Slaton, hereby stipulate that the United States will return the below described property to Florence Margaret Wolke for the sole purpose that such property will be used only for reasonable and necessary living expenses by Florence Margaret Wolke and no one else:

1) That part of the jewelry claimed to be Florence Margaret Wolke's seized from a 1978 Ford LTD, Arizona license WKX-310, and from a 1980 Cadillac El Dorado, Arizona license WHK-345 on April 9 and 10, respectively; and

APPENDIX F

2) A 1980 Cadillac El Dorado, Arizona license WHK-345.

The release of such property is subject to the following conditions:

1) That Clarence J. Crozier and Florence Margaret Wolke will jointly segregate the seized jewelry into that claimed by Clarence J. Crozier and that claimed by Florence Margaret Wolke. Any dispute between Florence Margaret Wolke and Clarence J. Crozier, or any challenge by the United States to any claim by Florence Margaret Wolke and Clarence J. Crozier will be resolved by the Court;

2) That Florence Margaret Wolke shall give a full, complete and truthful accounting to the Court by the last day of every month, detailing the sale of any of the jewelry released to her, and detailing the spending of the proceeds of the such sales. No proceeds from the sale of the jewelry and none of the jewelry itself shall be used for any purpose other than reasonable and necessary living expenses of Florence Margaret Wolke. Florence Margaret Wolke shall not sell the jewelry to any relative, or to any co-defendant in the captioned case and shall use best efforts to sell each item for its fair market value. Florence Margaret Wolke shall also set forth in each accounting any other income she has and how such income was spent, including her social security and disability income and benefits. Florence Margaret Wolke understands that the United States will provide the Court with an appraisal of the jewelry so that the Court can compare the sale prices to the appraised value of the jewelry.

3) The accounting to the Court will be ex parte and under seal. The government may inspect the accountings at the conclusion of the trial.

4) Florence Margaret Wolke will immediately return any jewelry she has not needed to sell for reasonable and necessary living expenses to the United States at the conclusion of the trial in the event the jury returns a verdict in favor of forfeiture of the jewelry.

5) Return of the jewelry to Florence Margaret Wolke will be made in accordance with the regulations and guidelines of the Drug Enforcement Administration for return of property.

6) Florence Margaret Wolke will not alienate, sell, dispose of, or encumber the 1980 El Dorado. The vehicle is released to Florence Margaret Wolke for her sole use only, and only until the conclusion of the trial in the captioned case if the jury returns a verdict in favor of forfeiture of this vehicle. If the jury does award forfeiture to the United States, Florence Margaret Wolke will immediately return the vehicle to the United States.

7) Florence Margaret Wolke will maintain the vehicle in a reasonable condition.

The claims of the United States that all of the jewelry and the 1980 Cadillac El Dorado are subject to forfeiture will in no way be adversely affected by this agreement. Also, Ms. Wolke's claims, that all of the jewelry and the 1980 Cadillac El Dorado are not subject to forfeiture, are not affected by this agreement. In no way is Ms. Wolke waiving any of her claims or rights previously asserted by signing this stipulation.

In the event that the Court determines that Florence Margaret Wolke expends proceeds of the sale of the jewelry contrary to this stipulation, uses the items of jewelry contrary to this stipulation, utilizes the vehicle contrary to this stipulation, or in any other manner violates any provision of this stipulation, this stipulation will be null and void, and Florence Margaret Wolke understands that she may be held in contempt of Court.

A. MELVIN McDONALD
United States Attorney
District of Arizona

BILLIE A. ROSEN
Asst. U. S. Attorney

TOM O'TOOLE
Federal Public Defender
District of Arizona

SANDRA LYNN SLATON
Asst. Federal Public Defender

FLORENCE MARGARET WOLKE

O R D E R

IT IS SO ORDERED.

DATE: September 13, 1982.

THE HONORABLE OZELL M. TRASK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DATE: September 13, 1982.

VALDEMAR A. CORDOVA, Judge
District of Arizona

NOV 12 198
FEDERAL PUBLIC DEFENDER
DISTRICT OF ARIZONA

FILED
NOV 10 1982
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant, v. FLORENCE MARGARET WOLKE, Appellees.	)	No. 81-1355
	)	O R D E R

Before: GOODWIN and TANG, Circuit Judges, and SOLOMON*, District Judge

Subject to such terms and conditions as the district court may prescribe to preserve necessary evidence, the motion of Florence Margaret Wolke for the return of her property is granted.

APPENDIX G

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

REC[illegible]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NOV 23 1982
FEDERAL PUBLIC DEFENDER
DISTRICT OF ARIZONA

DATE 11/23/82

UNITED STATES OF AMERICA,

PLAINTIFF,

vs.

FLORENCE MARGARET WOLKE, et al,

DEFENDANT.

No. CR 81-19 PHX VAC

IT IS ORDERED, pursuant to the November 10, 1982 Order of the Ninth Circuit Court of Appeals, that Florence Wolke's motion for return of property is granted, with the additional terms and conditions:

(1) That Ms. Wolke refrain from selling or giving away, or otherwise disposing of her clothes and luggage;

(2) That Ms. Wolke agree to return her clothing and luggage to the Government before trial in this case.

(3) That Ms. Wolke submit an accounting or accountings to the Court regarding the proceeds from the sale of furniture and the utilization of the proceeds in accordance with the accounting provisions set forth in the prior stipulation for release of property.

IT IS FURTHER ORDERED that excludable delay pursuant to Title 18, U.S.C. § 3161(h)(1)(8) is found to commence on November 17, 1982 for a total of 6 days.

DATED this 23rd day of November, 1982.

Viktor Florence A. Contreras

United States District Judge

cc: all counsel of record

[illegible]

APPENDIX H

FILED

Jul 9 5 05 PM '81

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, v. CLARENCE J. CROZIER, et al, Defendants.	NO.CR81-19 PHX VAC ORDER RE: MOTIONS TO SUPPRESS

The Court having had under advisement the motions to suppress of the defendants CLARENCE J. CROZIER, MANUEL I. PINE, ALLEN TERRY STEIN and FLORENCE MARGARET WOLKE, and the Court having duly considered the memoranda attached thereto, the evidence presented in support thereof and the opposition thereto, and the post hearing memoranda, the Court finds that the motions to suppress pertain to the search and seizure of the following: (1) the home ranch; (2) the 1980 Oldsmobile Toronado vehicle; (3) the 1978 Ford vehicle and 14 pieces of luggage; (4) the Crozier residence located at 12498 Avenue C., Yuma, Arizona; and (5) the Stein residence located at 5417 Francis Street, Yuma, Arizona (searches of April 9, 1980 and April 11, 1980).

THE HOME RANCH:

The Court finds that the affidavit in support of the search warrant for the home ranch was sufficient under the law to establish probable cause for the issuance thereof and that the search thereof was reasonable and pursuant to the warrant.

. . .

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APPENDIX I

IT IS THEREFORE ORDERED denying the motions of the defendants to suppress as to the evidence obtained and seized at the home ranch.

THE 1980 OLDSMOBILE TORONADO VEHICLE:

The defendant Allen Terry Stein was arrested about two miles inside the California border in his 1980 Oldsmobile Toronado. No arrest warrant had been previously secured. The Court finds that the arrest took place after the discovery of the clandestine laboratory of the home ranch. The search of the 1980 Oldsmobile Toronado was lawful in that there was probable cause to believe that the vehicle contained contraband, fruits or instrumentalities of a crime, especially where it was stopped on the open highway, and the other facts which the officers had within their knowledge.

A search warrant was issued subsequent to the arrest of the defendant Stein which authorized a search of the vehicle and all luggage contained therein. The obtaining of the search warrant for the luggage in the vehicle was what is Constitutionally required. The issuance of the search warrant and the execution thereof was reasonable and pursuant to law.

IT IS THEREFORE ORDERED denying the motions to suppress in respect to the search and seizure of the evidence contained in the 1980 Oldsmobile Toronado vehicle.

THE 1978 FORD VEHICLE AND 14 PIECES OF LUGGAGE:

All that is necessary to search a vehicle on the highway is probable cause. However, regarding containers such as luggage, such items can only be searched after a search warrant is obtained, absent exigent circumstances. The Court does not find that the courts have distinguished searches of car interiors from locked glove compartments and trunks where the search is premised on the automobile exception. This, or course, is subject to the necessity of obtaining a search warrant for the luggage. The Court finds the Government has a right to remove the vehicle to a police station

or to a place of safety to avoid endangering the safety of the agents or passengers from passing traffic. The 14 containers (luggage) were searched only after a search warrant therefor had been obtained.

The question was raised by the defendants that the search warrant for the 14 pieces of luggage was authorizing only a daytime search and that it was contrary to Rule 41(c)(1), Federal Rules of Criminal Procedure. However, in respect to controlled substances, search warrants are issued pursuant to 21 U.S.C. §879(a) which provides as follows:

> "A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time."

It is evident that §879(a) does not require a specific showing for a nighttime search other than contraband is likely to be on the property or the person to be searched at that time. The Court has considered whether the non-fundamental violation of Rule 41 required suppression where there is no prejudice to the defendant and where there is no evidence establishing or indicating bad faith or deliberate disregard of the rule. The appropriate inquiry when determining whether the exclusionary rule should be applied in particular circumstances is to decide whether unlawful police conduct would be sufficiently deterred by exclusion, to outweigh any detrimental effects of excluding the evidence. The 14 pieces of luggage were already in the possession of the officer when the warrant was obtained and this "non-fundamental violation" not demonstrating prejudice by the tardy execution of the warrant is not sufficient to warrant the exclusion since the search under such circumstances is reasonable within the contemplation of the law.

IT IS THEREFORE ORDERED denying the motions to suppress evidence obtained from the 1978 Ford vehicle and the 14 pieces of luggage.

THE CROZIER RESIDENCE - 12498 AVENUE C., YUMA, ARIZONA:

Ths search warrant for these premises is objected to by the defendants in that the description of items was too general and the agents unlawfully seized items outside the warrant. The warrant in particular described the matters to be seized as "amphetamine, precursor chemicals, including methylamine, P-2-P, ether and alcohol, and laboratory apparatus, notes, formulas, as well as any indicia of ownership and control of the premises." The search warrant does not state what notes or formulas, nor does it indicate guidelines for the type of documents or physical evidence which constitute indicia of ownership or control of the premises. Further, in respect to the search and seizure of physical evidence at the Crozier residence, the evidence indicates that when the agents went to obtain the warrant they directed other agents to secure the premises but that entry therein had not been directed or expected by the agents giving the order. The agents had no facts that would give them probable cause to believe that methamphetamine or any other controlled substance would be located within the residence. The Court therefore concludes that no exigent circumstances existed to justify the entry by the agents into the premises without a warrant.

Further, after the officers arrived to effect entry into the premises, they were on the premises for approximately 6 hours prior to the search warrant arrival. During that time they looked in every room in order to "secure the premises" and under these circumstances they had effectively seized the premises and the contents thereof. U. S. v. Allard, 634 F.2d 1182 (9th Cir. 1981).

Since the Court concludes that the warrant was overbroad and the execution thereof constitutes an unreasonable search and seizure under the law,

IT IS ORDERED granting the motion to suppress the evidence obtained at the Crozier residence located at 12498 Avenue C., Yuma, Arizona.

THE STEIN RESIDENCE - 5417 FRANCIS STREET, YUMA, ARIZONA:

There were two searches of the Stein residence; the first was April 9, 1980 and the second was April 11, 1980. After the arrest of the defendants Crozier and Stein, Agent Murphy directed other agents to proceed to this address and secure the premises, obstensibly to prevent the destruction or disposal of evidence being applied for in the warrant.

A warrantless entry was made into the Stein residence on April 9, 1980 and the premises were secured at least for 6 hours before the search warrant arrived. It is axiomatic that, in general, entry by law enforcement officers into a private residence without a warrant and without consent constitutes an unlawful intrusion. Schmerber v. California, 384 U.S. 757 (1966). The warrant of April 9, 1980 is different than the warrant for the Crozier residence. The search warrant for the Stein residence did not describe any property whatsoever and was merely a description in very general terms, as follows:

> "Material evidence of violation of 28 U.S.C. §841, 846. Manufacture and possession with intent to distribute amphetamine and conspiracy."

The affidavit in support of the warrant does describe with particularity certain personal items, such as gold colored coins, diamonds, emeralds, numerous rings, necklaces, et cetera, as well as books and records of financial transactions.

It is clear that the affidavit may set forth many items of property, contraband, records and documents, and that the Magistrate in his discretion may exclude items. The Court concludes that the search must be pursuant to the warrant and not necessarily pursuant to the affidavit. The warrant does not describe anything to be seized nor does it indicate that the Magistrate exercised his law given discretion in directing the agents regarding the property to be seized. A warrant merely describing "material evidence under 21 U.S.C. §841,846 clearly leaves to the agent the unbridled discretion to seize whatever he determines is evidence in the case. Were the Court to sanction such a general warrant it would be the sanctioning of

the proposition that the property to be seized need not be described with particularity and that the agent can take whatever he decides is evidence of the offense. The Court concludes that the law is to the contrary.

Further, in the search of the Stein residence, the execution thereof was so overbroad as to constitute a general search, and again as in the search of the Crozier residence, the agents effectively seized the premises and the contents thereof contrary to U.S. v. Allard, supra.

Subsequent to the initial search of April 9, 1980, the agents again searched the Stein residence on April 11, 1980. On the April 9th search, they photographed jewelry within the residence and then obtained the warrant in respect thereto. Since the Court has found the search of the Stein residence unreasonable and contrary to law, the Court now finds that the seizure of April 11, 1980 were the fruits of the poisonous tree which stemmed from the illegal search of April 9, 1980.

IT IS THEREFORE ORDERED granting the motions to suppress the evidence obtained from the Stein residence located at 5417 Francis Street, Yuma, Arizona, on April 9, 1980 and April 11, 1980.

DATED this 9th day of July, 1980.

Valdemar A. Cordova
U. S. District Judge

cc:
U.S. Marshal ( )
Probation ( )
U.S. Attorney (/)
Immigration ( )
Atty for Deft ( )
Defendant (9)
Judge ( )
Order Book ( )
Other: ( )
CRD's Initials: AM
Date: July 10 1980

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-819

UNITED STATES OF AMERICA, PETITIONER

-vs-

CLARENCE JAY CROZIER AND
FLORENCE MARGARET WOLKE, ET AL.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN
FORMA PAUPERIS

Respondent, FLORENCE MARGARET WOLKE, pursuant to Rule 46, Supreme Court Rules, and Title 18 United States Code §3006(d)(b), respectfully moves this Honorable Court for leave to file the attached Opposition to the Petition of the United States of America for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without pre-payment of costs and to proceed in forma pauperis. Counsel undersigned was appointed to represent Ms. Wolke in the District Court and on appeal to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted: January 19, 1983.

TOM O'TOOLE
Federal Public Defender
District of Arizona

SANDRA LYNN SLATON
Asst. Federal Public Defender
U.S. District Court House
230 North First Avenue
Room 5202, Federal Bldg.
Phoenix, Arizona 85025
Telephone: FTS 261-3561
Attorney for Respondent Wolke

FILED
JAN 21 1983
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-819

UNITED STATES OF AMERICA, PETITIONER,

-vs-

CLARENCE JAY CROZIER AND
FLORENCE MARGARET WOLKE, ET AL.

NOTICE OF APPEARANCE

THE CLERK will enter the appearance of counsel undersigned as counsel for FLORENCE MARGARET WOLKE, who in this Court is the Respondent. Counsel undersigned was appointed to represent Ms. Wolke in the District Court and on appeal to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted: January 19, 1983.

TOM O'TOOLE
Federal Public Defender
District of Arizona

Sandra Lynn Slaton

SANDRA LYNN SLATON
Asst. Federal Public Defender
U.S. District Court House
230 North First Avenue
Room 5202, Federal Bldg.
Phoenix, Arizona 85025
Telephone: FTS 261-3561
Attorneys for Respondent Wolke

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-819

UNITED STATES OF AMERICA, PETITIONER

-vs-

CLARENCE JAY CROZIER AND
FLORENCE MARGARET WOLKE, ET AL.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN
FORMA PAUPERIS

Respondent, FLORENCE MARGARET WOLKE, pursuant to Rule 46, Supreme Court Rules, and Title 18 United States Code §3006(d)(b), respectfully moves this Honorable Court for leave to file the attached Opposition to the Petition of the United States of America for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without pre-payment of costs and to proceed in forma pauperis. Counsel undersigned was appointed to represent Ms. Wolke in the District Court and on appeal to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted: January 19, 1983.

TOM O'TOOLE
Federal Public Defender
District of Arizona

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Room 5202, Federal Bldg.
Phoenix, Arizona 85025
Telephone: FTS 261-3561
Attorney for Respondent Wolke